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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GOLDEN GATES HEIGHTS INVESTMENTS,

Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT

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15 August 1993

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QUESTION PRESENTED

I. UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHERE A GOVERNMENT ENTITY ACQUIRES PRIVATE PROPERTY IN EMINENT DOMAIN FOR PUBLIC USE AS OPEN SPACE, MAY COMPENSATION BE BASED ON THE ASSUMPTION THAT, ABSENT THE EMINENT DOMAIN PROCEEDINGS, THE GOVERNMENT ENTITY COULD HAVE REQUIRED THE PROPERTY OWNER TO DEVOTE TWO THIRDS OF THE PARCEL TO OPEN SPACE USE WITHOUT COMPENSATION?

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CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

PETITION FOR CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the California Court of Appeal for the First Appellate District entered in this proceeding.

CITATION TO OPINION BELOW

The opinion of the California Court of Appeal for the First Appellate District, published at 14 Cal.App.4th 1203, appears in the appendix hereto.

JURISDICTION

The opinion of the California Court of Appeal for the First Appellate District was filed on March 3, 1993. The California Supreme Court denied review on May 20, 1993. This petition is filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1257.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Constitution of the United States
Amendment V [1791]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In 1986, petitioner purchased a half acre parcel of land located in San Francisco, California. Portions of the parcel

were covered by distinctive scenic rocky outcroppings. Under applicable local zoning, the parcel was devisable into fourteen single family lots. Development of the parcel with fourteen single family homes would have been physically feasible and consistent with surrounding uses.

Shortly after purchasing the parcel, petitioner applied to subdivide the parcel into fourteen standard size single family lots. Following some delay, the City of San Francisco (the "City") commenced eminent domain proceedings to acquire the parcel for public use as open space. The City then informed petitioner that the subdivision application was "suspended" and "deemed denied" due to pendency of the eminent domain action.

At the eminent domain trial, petitioner sought compensation based on the fourteen lots permitted under the San Francisco Planning Code. The City, however, maintained that petitioner should be compensated for only five lots. It reasoned that, absent the eminent domain proceedings, the City Planning Commission would have exercised its discretion by requiring petitioner to devote to open space use, the two thirds of its property covered with scenic rock outcroppings. Permission to build on even five lots would have been conditioned upon dedication of the balance of the property to the visual benefit of the public.

Petitioner contended that the City's approach to valuation was violative of the Fifth Amendment to the United States Constitution, as explicated in such cases as *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The trial court, however, accepted the City's theory of valuation, and awarded compensation based on the assumption that petitioner would have been required to devote two thirds of its property to the visual benefit of the public as open space, and permitted

to build on only five lots. This ruling deprived petitioner of compensation for two thirds of its parcel, worth approximately one million dollars. The California Court of Appeal for the First Appellate District affirmed the trial court's theory of valuation in the published opinion appended hereto.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW TO PROVIDE A MORE COMPREHENSIBLE AND COMPREHENSIVE FRAMEWORK FOR JUST COMPENSATION ANALYSIS, CONSONANT WITH THE UNDERLYING PURPOSE OF THE JUST COMPENSATION CLAUSE

Candor requires any student of Fifth Amendment just compensation jurisprudence to acknowledge that this area of the law cries out for a comprehensive and comprehensible analytic framework. In the half century and more since this Court decided such seminal cases as *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), and *Pennsylvania Coal Company v. Mahon*, 260 U.S. 393 (1922), state and federal courts have failed to develop an intellectually and morally credible doctrine reconciling government's police power authority to prohibit nuisances and promote harmonious land use, with its obligation to pay just compensation where private property is taken for public use.

Much of the case law attempting such a reconciliation is a jumble of distinctions without differences. Great and perhaps insupportable weight is placed on the distinction between physical and regulatory takings. Full compensation has been afforded for even minute physical invasions. Yet regulatory takings, which deprive an owner of most of the value of

property, are permitted to go uncompensated if the owner retains a scintilla of economically viable use. (Compare *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), with *Keystone Coal Association v. DeBenedictis*, 480 U.S. 470 (1987) and cases cited in footnote 18 therein) This distinction has, naturally, prompted property owner litigants and some jurists, to seek an alchemy for transforming regulatory interference into physical invasion. (See generally, *Yee v. City of Escondido*, 112 S.Ct. 1522 (1992)) Conversely, governmental entities and other jurists, such as those in the case at bar, have stretched and strained to apply standards from regulatory takings cases even in the face of a total physical appropriation.

What is notably absent from the bulk of the case law, however, is any consideration of the question which should stand at the heart of every just compensation analysis: whether state action has "unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." (*Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992). See also *Armstrong v. United States*, 364 U.S. 40 (1950)) While this Court's recent opinions in *Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992), and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), indicate that there are limits on the public benefits which may be extracted from private property owners under the guise of prohibiting a nuisance, or as a *quid pro quo* for a permit to improve property, a clearer and more comprehensive statement is needed to insure meaningful and consistent enforcement of the Fifth Amendment guarantee of just compensation in the lower courts. This case, which is free of factual and procedural clutter, offers an ideal context in which to provide the necessary clarification.

The case at bar is a textbook illustration of the deficiencies of contemporary just compensation jurisprudence.

Calculation of the compensation due in this case should have been straightforward. The City, recognizing the scenic value of the rocky outcroppings on petitioner's property, sought to acquire the entire property for public use as open space. This, of course, constituted a physical taking of the property.[1] Thus, the City was required to pay petitioner the full value of the property. The full value of the property could and should have been calculated based on the number of lots permitted under the City Planning Code.

Instead of awarding petitioner the full value of the property, assuming development consistent with local zoning law and the character and density of development on adjoining properties, however, the California courts instead awarded compensation based on the assumption that, absent the eminent domain proceedings, the City would have used its police power to coerce petitioner to devote the scenic rock outcroppings to the visual benefit of the public, without payment of any compensation whatsoever. This Court should grant certiorari to explain why such a holding cannot satisfy the just compensation requirement imposed by the Fifth Amendment to the United States Constitution.

The lower courts' analysis should be held constitutionally defective for three distinct reasons. First, the City of San Francisco was not free to require dedication of the scenic rock outcroppings to the benefit of the public, under the guise of prohibiting a public harm. As this Court indicated in *Lucas v. South Carolina Coastal Commission*, *supra*, such a characterization is a natural temptation to any local government seeking to compel a particular land use for the benefit of the public,

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[1]See *Yee v. City of Escondido*, 112 S. Ct. 1522, 1526 (physical taking occurs when government "takes title").

without payment of just compensation. Nevertheless, a use consistent with adjacent uses (and in this case with applicable zoning), ordinarily imports the absence of a common law nuisance, and under these circumstances, government may not prohibit the use without payment of just compensation. (*Lucas v. South Carolina Coastal Commission*, 112 S.Ct. 2886 (1992)) The California Court of Appeal endeavored to distinguish *Lucas* on the ground that the property owner in that case was deprived of all economically viable use of his property. This Court should grant certiorari to hold that government may not compel uncompensated dedication of any private property to the benefit of the public, under the guise of prohibiting a public harm, regardless of whether or not this would deprive the owner of all economically viable use of the property.

A second constitutional defect in the Court of Appeal's analysis, is its assumption that the San Francisco Planning Commission could have conditioned issuance of any building permits for petitioner's parcel, upon petitioner's agreement to dedicate two thirds of its property to the visual benefit of the public. Such a requirement would, on its face, appear to run afoul of this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Yet the Court of Appeal held that such a requirement would not run afoul of the principles enunciated in *Nollan*, because the dedication required in this case would not have entailed a physical invasion.

This is a distinction without a difference. From petitioner's economic standpoint, the cost of preserving the rock outcroppings for the visual benefit of the public is the same, whether the public is permitted to climb over the rock outcroppings or is confined to admiring the outcroppings from the base of the slope or from boats at sea. This court should grant certiorari to hold that issuance of a building permit may not be conditioned upon dedication of private property to the

benefit of the public, regardless of whether the public is granted an easement to physically trespass on the property.[2] This court should also hold that where the government has elected to take property in fee simple, payment for the property may not be excused based on speculation that the government could have bestowed essentially the same benefits upon the public without actually taking title to the property.

A third critical shortcoming of the Court of Appeal's analysis in this case, is that it gives no consideration whatsoever to the question which should provide the key to all just compensation analysis, to wit, whether state action has "unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." (*Yee v. City of Escondido*, 112 S.Ct. 1522, 1526 (1992). See also *Armstrong v. United States*, 364 U.S. 40 (1950)) Stressing that petitioner would not have been deprived of all economically viable use of the property if permitted to build on five lots, the Court of Appeal never paused to inquire whether the cost of preserving the rock outcroppings for the benefit of the public, was a cost which should be borne by the taxpaying public rather than by petitioner.

As this Court stated in dicta in *Yee v. City of Escondido*, a compensable regulatory taking occurs if "the purpose of the regulation ***or*** the extent to which it deprives the owner of the economic use of the property suggests that the regulation has unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." (*Yee*, *supra*, 112 S.Ct at 1526. Emphasis added.) The *Yee* test is stated in the

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[2]In so holding, this court should expressly overrule the Ninth Circuit's opinion in *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), and adopt the views expressed by dissenting Judge Beezer therein.

disjunctive; even where the *extent* of interference with an owner's economic use of his property does not, in and of itself, reveal a compensable taking, compensation is nonetheless due if "the *purpose* of the regulation ... suggests that the regulation has unfairly singled out the property owner to bear a burden which should be borne by the public as a whole." This Court should grant certiorari to hold that a regulation which forces a private party to bear costs which should be borne by the public as a whole, constitutes a compensable taking, regardless of whether the regulation deprives the private party of all economically viable use of his property.

The practical shortcomings of the mode of analysis employed by the California courts are manifest. This mode of analysis is an open invitation to the grossest sort of abuse. Following this approach, any county or municipality seeking to acquire land, might always acquire the land for a fraction of market value. The governmental entity need only select a parcel without subdivision or building permits, and then urge that even if it had not chosen to acquire the land, it would never have authorized subdivision or issued permits for more than one structure. While this approach would prove particularly attractive to governmental entities seeking to acquire land for open space or park use, there would be nothing to prevent the government from actually building on property so acquired, after the eminent domain judgment became final.

There is virtually no limit to how much land government could acquire free of charge utilizing this method. The larger the unsubdivided parcel the government could locate, the deeper the discount it would enjoy. A county might acquire a 100 acre ranch on the outskirts of a growing city, and value

the land on the assumption that it could be improved with only a single home.

The California court's opinion honors the values underlying the Fifth Amendment Just Compensation Clause in the breach. Yet, it is a characteristic manifestation of the state of contemporary just compensation jurisprudence. Indeed, the opinion below is the natural and inevitable consequence of the miscellany of disjunctive and mechanical just compensation tests presently employed by the lower courts. This Court should therefore grant certiorari to elucidate the implications of its holdings in *Nollan*, *Lucas*, and *Yee*, and to provide a unified, coherent, and comprehensible framework for just compensation analysis.

CONCLUSION

For the aforestated reasons, a writ of certiorari should issue as prayed.

Respectfully submitted,

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15 August 1993

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CITY AND COUNTY OF SAN FRANCISCO
Plaintiff and Respondent,
v.
GOLDEN GATE HEIGHTS INVESTMENTS,
Defendant and Appellant.

No. AO55754
(Superior Court No. 915-867,
City and County of San Francisco)
California Court of Appeal
First Appellate District
Division Three
Filed March 3, 1993

This is an eminent domain action brought by the City and County of San Francisco (City) to acquire a single lot owned by Golden Gate Heights Investments (GGHI). The property is a vacant, steep hillside in the Sunset neighborhood of the city. The property is known as the "Rock Outcropping" because it bears large and unique rock outcroppings visible from the Pacific Ocean. The City is acquiring the property to preserve it for open space. GGHI appeals from the judgment in condemnation, challenging the court's valuation of the property.

FACTS

In 1986, GGHI purchased the subject property for $200,000. At the time of the purchase, both GGHI and the seller believed the property could be developed for residential use. The property was zoned R1, which meant it could be developed into 14 residential lots.

Immediately following the close of escrow, GGHI retained an architect and set up a meeting with the City Planning Department to discuss development of the property. During the meeting at the City Planning Department, it was discovered that the property inadvertently had been omitted from the City's open space map; GGHI was led to believe the City would not process an application to develop the property until the City determined whether it wanted to acquire the property.

On November 13, 1989, City's Board of Supervisors adopted a resolution of public interest and necessity to acquire the property for open space. On February 9, 1990, City filed this eminent domain action.

At trial, City maintained that, even the absence of eminent domain proceedings, the planning commission would have required GGHI to devote to open space use, nine of the fourteen lots authorized under the planning code. Lucian Blazej, a city planner, testified that in February of 1987, GGHI was advised that even if the property could be developed, 14 lots on the property was unrealistic; only 5 lots could be developed. This was due to the natural features of the rocks, the fact there was natural foliage, and the virgin nature of the property. Dean Macris, Director of Planning for the City, stated that although there was no way to absolutely predict what the planning commission would do, he thought it unlikely the commission would approve development on more than five lots.

City produced two expert appraisal witnesses, John Clifford and Frank Mahoney, to testify to the value of the condemned property. Clifford valued the property at $535,000. Mahoney valued it at $500,000. GGHI's expert witness was Arthur Gimmy. Gimmy valued the property at $1,620,000.

The trial court found the subject property could not have been subdivided into more than five lots with a fair market value of $100,000 per lot. Accordingly, it valued the property at $500,000. The court also found there had been no unreasonable delay in commencing an eminent domain action which would justify precondemnation damages. This appeal followed.

DISCUSSION

Planning Commission Approval

GGHI contends the trial court erred by valuing the property based on speculation that City's Planning Commission could have required GGHI to dedicate nine out of fourteen possible lots to public use as open space. The contention is based on the premise that City's planning code authorizes fourteen lots on the subject property. Citing Lucas v. South Carolina Coastal Council (1992) ____ U.S. ____ [112 S.Ct. 2886] and Nollan V. California Coastal Comm'n

(1987) 483 U.S. 825, GGHI maintains City could not require it to dedicate nine out of fourteen lots for open space without paying just compensation. GGHI misreads these cases.

In Lucas, the property owner purchased beachfront property prior to the adoption of a state statute prohibiting all development o the property. After passage of the new legislation, the property owner filed suit, contending that the legislation effected a taking of his property without just compensation. The trial court found the legislation deprived the property owner of any reasonable economic use of the property and rendered it valueless. The state Supreme Court reversed. The court ruled that when a regulation respecting the use of property is designed to prevent serious public harm, no compensation is owned under the takings clause. The United States Supreme Court disagreed, holding that "noxious-use logic cannot serve as a touchstone to distinguish regulatory 'takings'--which require compensation--from regulatory deprivations that do not require compensation." (Lucas v. South Carolina Coastal Council, supra, _____ U.S. _____ [112 S.Ct. at p. 2899].)

However, the Lucas court acknowledged and reaffirmed its historical approach to governmental regulation of private property. The approach starts with the rule that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." (Penna. Coal Co. v. Mahon (1922) 260 U.S. 393, 415.) Although the high court has avoided any set formula for determining how far is too far since Mahon, it has articulated at lease two categories of regulatory action as compensable. The first encompasses regulations that compel the property owner to suffer a physical invasion of his or her property; the second is where regulations deny all economically beneficial or productive use of land. (Lucas v. South Carolina Coastal Council, supra, _____ U.S. _____, _____ [112 S.Ct. at p. 2893].) Since the trial court in Lucas determined that the South Carolina legislation had rendered the beachfront property valueless, the case falls within the second category.

In Nollan, the California Coastal Commission conditioned a beachfront building permit upon granting a public easement across the property. The Supreme Court held that if California wanted to advance it plan to provide public access to the ocean by using its

power of eminent domain, the Fifth Amendment required the state to pay for it. (Nollan v. California Coastal Comm'n, supra, 483 U.S. at pp. 841-842.) Nollan involves a physical taking, rather than an regulatory taking. (See Yee v. City of Escondido, Cal. (1992) _____ U.S. _____, _____ [112 S.Ct. 1522, 1530]; Blue Jeans Equities West v. City and County of San Francisco (1992) 3 Cal.App. 4th 164, 169.) As such, it falls within the first category of regulatory which mandates compensation.

Both Lucas and Nollan can be distinguished from the case at bench. Unlike the facts in Lucas, GGHI's property would not have been rendered valueless had the planning commission permitted development of only five lots. Although GGHI purchased a single parcel of real estate which it intended to subdivide into 14 lots, restriction of the property to 5 lots would not have deprived GGHI of "any reasonable economic use" of the land. "Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole...." (Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 130.) Nor are the facts here similar to those in Nollan. The planning commission's denial of a 14-lot subdivision application would not have required GGHI to "submit to the physical occupation of [its] land." (Yee v. City of Escondido, Cal., supra, _____ U.S. _____, _____ [112 S.Ct. at p. 1530].)

Comparable Sales

At the commencement of trial, GGHI moved to exclude evidence of the prices paid by City for adjacent parcels which were acquired for use as open space. The court denied the motion without prejudice. GGHI renewed its objection at the time City introduced it at trial. Citing Evidence Code section 822, subdivision (a)(1).[1] GGHI now asserts the trial court erred by admitting and relying upon evidence of comparable sales consummated under the threat of eminent domain condemnation. The contention lacks merits.

Section 822, subdivision (a) states: "In an eminent domain or inverse condemnation proceeding, notwithstanding the provisions of Section 814 to 821, inclusive, the following matter is inadmissible as evidence and shall not be taken into account as a basis for an opinion as to the value of the property: [¶] (1) The price or other terms and circumstances of an acquisition of property or property interest if the acquisition was for a public use for which the property could have been taken by eminent domain, except that the price or other terms and circumstances of an acquisition of property appropriated to a public use or a property interest so appropriated shall not be excluded under this section if the acquisition was for the same public use for which the property could have been taken by eminent domain." (Emphasis supplied.) GGHI contends the above-underscored exception, added by amendment in 1988 (see Stats. 1987, ch. 1278, § 1, p. 4548), applies only to condemnation of utility properties. (See Matteoni & Veit, Condemnation Practice in California (Cont.Ed.Bar Supp. 1992) § 9.49, p. 161.) We do not read the statute as so limited. Nor does GGHI's cited authority so state.

Moreover, even if we assume it was error to accept evidence of the sale of adjacent properties, there was no prejudice to GGHI. As the statement of decision makes clear, the trial court was greatly influenced by evidence of other comparables: "The City's appraisers also relied heavily on the sales of 368 and 352 San Marcos for $125,000 and $135,000 per lot respectively. These properties had lower development costs than the subject and are located in a superior neighborhood with superior views. A reasonable adjustment for these factors supports a value of $100,000 for the subject. Even the sale on which Mr. Gimmy heavily relies, Hawk Hill, indicated $110,000 per lot. An adjustment downward would be necessary for the subject property because the evidence indicated that Hawk Hill would have lower development costs than the subject."

Prior Sale of the Property

GGHI contends it was error to admit evidence of GGHI's purchase price of the subject property in 1986. It maintains the purchase price was depressed due to 20 years of "condemnation blight," the sale was too old to use as a comparable and City's

motivation was to prejudice the court against awarding an excessive profit by GGHI. We disagree.

Evidence of the sale of the subject property is specifically admissible pursuant to section 815. Moreover, "evidence of other sales of the identical real property is admissible and that matters such as a change of value between the time of the sale and the time of the condemnation ordinarily go merely to the weight of the evidence and not to compel exclusion. [Citations.]" (L.A. Country Flood etc. Dist. v. McNulty (1963) 59 Cal.2d 333, 337.)

Substantial Evidence

GGHI contends the trial court's valuation was not supported by substantial evidence. The contention is principally based on the fact that valuation was based on subdivision of the property into five rather than fourteen units. We have previously found that determination to be proper.

GGHI also criticizes the court's reliance on valuation of the San Marcos Street properties, its failure to discuss City's seven other comparables in its statement of decision, City's appraisers' subdivision ("land residual") method of analysis, and their assumption City would not act on a subdivision application until at least three years after the date of trial.

In determining the sufficiency of the evidence to support a judgment, this court does not reweigh the evidence. Rather, we resolve all conflicts in favor of the prevailing party and view the evidence in the light most favorable to that party. (Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 398.) We give the prevailing party the benefit of every reasonable inference from the evidence. (In re Marriage of Mix (1975) 14 Cal.3d 604, 614.) Put another way, while we examine all evidence, we will consider only the evidence supporting the successful party. (Community Cause v. Boatwright (1987) 195 Cal.App.3d 562, 569.)

With respect to the San Marcos Street properties, the evidence supports the court's finding that these properties have lower development costs, are located in a better neighborhood and have better views. In addition, there is no support for GGHI's claim that the court ignored seven other comparables. There was evidence that although the sales of these properties was for more than $100,000

per unit, each of the lots would have lower development costs than the subject property. The court's failure to discuss each comparable in its statement of decision does not mean they were ignored.

GGHI's criticism of the "land residual" method of appraisal is somewhat confusing. As GGHI states in its own opening brief, City's two appraisers each placed primary reliance upon a "direct comparison" analysis and only employed a "land residual" analysis as a check. Moreover, as it acknowledges in its reply brief, the court's statement of decision relies exclusively upon the direct comparison analysis.

Costs for Unreasonable Precondemnation Activities

At trial GGHI produced the following evidence to show City had engaged in unreasonable precondemnation activity: On February 8, 1987, the City Planning Department wrote to GGHI that "[i]f the Recreation and Park Commission determines it has no interest in acquiring the property, the Planning Department is obliged to permit development of the site, subject to the Planning Code." In February of 1988, City approached GGHI concerning a possible voluntary sale of the property. Negotiations concerning a voluntary sale broke down in August of 1988, when the deputy city attorney denied knowledge of an open space designation of the property. GGHI subsequently brought an inverse condemnation action in federal court. However, the federal court dismissed the action, since GGHI had not filed a development application. GGHI subsequently filed a subdivision application. In December 1989, GGHI submitted an amended application, including photographs, Proposition M findings, an amended parcel map, and an environmental evaluation to support the application. City filed its eminent domain action 63 days later.

GGHI now contends that, in addition to the fair market value of the property, it is entitled to be reimbursed for its architect, engineer and consultant fees, its subdivision application fees, property taxes, mortgage carrying costs, and prejudgment interest incurred during the two-year period intervening between City's notice of formal intent to condemn[2] and the date of judgment.

A property owner is entitled to precondemnation damages where it can be demonstrated that "the public authority acted improperly either by unreasonably delaying eminent domain action

following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." (Klopping v. City of Whittier (1972) 8 Cal.3d 39, 52, fn. omitted, emphasis supplied; see also Smith v. City and County of San Francisco (1990) 225 Cal.App.3d 38, 46-47.) Whether there has been unreasonable delay or unreasonable conduct by the condemner is a question of fact. (Cambria Spring Co. v. City of Pico Rivera (1985) 171 Cal.App.3d 1080, 1098.)

In the instant action, we need only note there is no evidence the property decreased in value as a result of City's conduct. GGHI purchased the property for $200,000; it was appraised for between $500,000 and $1,680,000.

Moreover, the facts in this case are entirely different than those alleged in People ex rel. Dept. of Transportation v. Gardella Square (1988) 200 Cal.App.3d 559. In that case, a partnership had purchased property for the purpose of developing a shopping center. The Department of Transportation filed a condemnation action seeking one-half of the partnership property. The partnership answered and alleged they had met all requirements for county permits and entitlements for construction except for a state encroachment permit; the department had delayed processing the encroachment permit to prevent construction of the shopping center, and as a result of this action the partnership was unable to meet loan commitments and was faced with foreclosure. The partnership alleged the precondemnation activity constituted a taking and entitled the partnership to inverse condemnation damages for loss of use of its principal. (Id., at p. 564.) The Court of Appeal remanded the action for a determination of whether the partnership could prove the essential Klopping elements. (People ex rel. Dept. of Transportation v. Gardella Square, supra, at p. 574.) In contrast to the allegations in Gardella Square, GGHI did not file a complete subdivision application until after City had adopted a resolution to acquire the property. The record is devoid of evidence City intentionally delayed development of GGHI's property.

DISPOSITION

The judgment is affirmed.

White, P.J.

We concur:
Merrill, J.
Chin, J.

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1. All further statutory references are to the Evidence Code unless otherwise indicated.

2. The court found this date to be November 13, 1989.

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE
FIRST APPELLATE DISTRICT
DIVISION THREE

FILED
MAR 30 1993
Court of Appeal-First App. Dist.
RON D. BARROW
By Deputy

CITY AND COUNTY OF SAN FRANCISCO
vs.
GOLDEN GATE HEIGHTS INVESTMENTS, ET AL.
A055754
SAN FRANCISCO COUNTY NO. 915867

BY THE COURT:

The petition for rehearing is denied.

DATED: MAR 30 1993

WHITE, P.J.

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
MAY 20 1993
Robert Wandruff, Clerk
BY DEPUTY

No. SO32254 (AO55754)

GOLDEN GATE HEIGHTS INVESTMENTS,

Appellant,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

Appellant's petition for review DENIED.

The request for an order directing depublication of the opinion is denied.

LUCAS
Chief Justice

MOTION FILED
SEP 17 1993

No. 93-274

In the

Supreme Court of the United States

October Term, 1993

GOLDEN GATE HEIGHTS INVESTMENTS,
Petitioner,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Respondent.

Petition for Writ of Certiorari to the California First District Court of Appeal

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this court for leave to file the accompanying brief amicus curiae in support of the petition for writ of certiorari. Written consent to the filing

of this brief has been granted by counsel for petitioner and the letter of consent has been lodged with the clerk of this Court. Consent has been withheld by counsel for respondent City and County of San Francisco thereby requiring the filing of this motion.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

Its attorneys were counsel of record in the landmark United States Supreme Court case, *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992); *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The present case involves the use of predatory land use policies by the City and County of San Francisco (City) to justify the uncompensated physical appropriation of an easement over petitioner's land. The opinion below upholds an eminent domain proceeding that deprives petitioner of most of the value of its property. This deprivation was based on the City's assertion that the value of petitioner's property would otherwise have been diminished by the uncompensated seizure of an easement via the application of restrictive land use regulations.

The court below acquiesced in the City's violation of petitioners' fundamental rights by refusing to apply heightened scrutiny to the City's actions, as required by this Court in *Nollan v. California Coastal Commission*. If allowed to stand, the opinion below will constitute a serious

setback for individual rights by undermining this Court's careful efforts over the past two decades to restore full constitutional protection to private property rights.

Amicus firmly believes that review by this Court is necessary to resolve the conflicts created by the California courts in their efforts to avoid complying with *Nollan*.

DATED: September ____, 1993.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interest of amicus Pacific Legal Foundation (PLF) is set forth in the preceding motion for leave to file this brief.

STATEMENT OF THE CASE

In 1986 petitioner Golden Gate Heights Investments (GGHI) bought an undeveloped parcel of land within the jurisdiction of the City and County of San Francisco. In accordance with the property's then-existing zoning, petitioner proceeded with plans to develop 14 residential homesites on the parcel. The City responded with a resolution to acquire the property and brought condemnation proceedings under its powers of eminent domain.

At trial, petitioner established that it had a reasonable investment-backed expectation of developing and selling 14 residential homesites on its property. Such use was consistent with all existing zoning, planning, and other regulations at the time petitioner purchased the property and began development activities.

The City did not deny that petitioner had the legal right to develop 14 homesites on its property, nor was there any dispute that petitioner had a reasonable, investment-backed expectation in such development. Rather, the City argued that it would never have allowed petitioner to exercise its constitutional right to develop its property!

Although the City's own planning code clearly authorized the development of 14 homesites on petitioner's property, the City claimed it would have simply confiscated the equivalent of 9 of these sites, demanding that

they be dedicated to public use as a condition for approving development of the remaining 5 sites. **Since the City would not have paid compensation for the *regulatory* confiscation of petitioner's property, the City urged that it should not be required to compensate petitioner for the *physical* taking of these same sites via eminent domain!**

The trial court agreed with this astounding reasoning and awarded petitioner no compensation for the City's seizure of nearly two-thirds of the property in question. Compensation was required for the value of only five of petitioner's homesites, allowing the City to seize the equivalent of the other nine sites without payment.

SUMMARY OF ARGUMENT

The Takings Clause of the Fifth Amendment to the United States Constitution requires payment of just compensation when private property is taken for public use.

In *Nollan v. California Coastal Commission*, this Court established a requirement of heightened judicial scrutiny for courts examining property regulations challenged as regulatory takings. 483 U.S. 825, 834 n.3 (1987). The deferential standard of review appropriate to due-process inquiries was specifically rejected as inadequate for takings cases. *Id.*

In the present case, petitioner suffered the uncompensated taking of an easement over his property by the City and County of San Francisco. In condemnation proceedings, the City was awarded a portion of petitioner's land--the equivalent of nine buildable homesites--without payment of compensation. The City's rationale for this confiscation was that, if petitioner had proceeded with its plans to develop the property, the City would have seized an equivalent easement in exchange for issuing building permits on the remaining five homesites.

Petitioner raised what should have been a self-evident argument--that the City's proposed regulatory seizure of nearly two-thirds of the property would itself have required compensation under the Takings Clause. On appeal, however, the court below employed a series of tortured evasions to acquiesce in the City's confiscatory actions.

By rejecting the requirement of heightened scrutiny laid down by this Court in *Nollan*, the court below abjectly defers to the City's forcible appropriation of petitioner's land. Worse, the appellate panel justifies its holding by distorting and misstating this Court's holdings in *Nollan* and *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992).

The petition for certiorari should be granted not only to correct the manifest injustice petitioner has suffered but to

eliminate the doctrinal conflicts created by the California court in its efforts to avoid complying with *Nollan*.

ARGUMENT

I

THE COURT BELOW ERRED IN NOT APPLYING HEIGHTENED SCRUTINY TO THE CITY'S SEIZURE OF AN EASEMENT ACROSS PETITIONER'S LAND

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V. This Court has long held that the Takings Clause can be violated by either of two broad categories of state action. Uncompensated physical invasions of property are *per se* violations of the Takings Clause under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Takings Clause is also violated by land use regulations that fail to substantially advance legitimate state interests or deprive the owner of economically viable use of property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

In its leading case in the field of regulatory takings, this Court clearly established that land use regulations challenged under the Takings Clause must be subjected to a heightened standard of judicial review. Such enactments may

no longer be upheld merely by reference to a "rational relationship" to their asserted objectives:

> [O]ur opinions do not establish that [takings] standards are the same as those applied to due process or equal protection claims. To the contrary, ... [w]e have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, not that "the State '*could rationally have decided*' the measure adopted might achieve the State's objective."

Nollan, 483 U.S. at 834 n.3 (citations omitted; emphasis in original).

Nollan involved the uncompensated seizure of an access easement by the Coastal Commission as a condition to the issuance of a building permit. This Court recognized that, had the Commission simply seized the easement outright, compensation would have been required by the Takings Clause. *Id.* at 831. *Nollan* went on to establish that compensation was also required if the easement was seized *by regulation*, so long as the property owners were not uniquely responsible for the harm being mitigated by the easement. *Id.* at 835 n.4. Most important, the decision required courts to closely examine such regulatory exactions to determine whether they are legitimate exercises of the police power or merely thinly disguised demands of extortion. *Id.* at 834 n.3.

The case at bar presents identical issues, with the addition of eminent domain proceedings. *Nollan* reaffirms that, if the City had simply seized a view easement across petitioner's property, compensation would be required under the Takings Clause. *Id.* at 831. Moreover, since petitioner is in no way responsible for the City's sudden desire to establish a view easement across this site, *Nollan* establishes that the City may not simply confiscate such an easement as a condition to the issuance of a building permit. *Id.* at 835 n.4.

By logical extension, if the City cannot simply expropriate the easement and may not seize it as a permit condition, the trial court erred in assigning no value to the easement at eminent domain. In effect, the trial court made the City a gift of an easement over petitioner's property. Even more important, the appellate panel erred in failing to apply heightened scrutiny to reveal the City's actual confiscatory role in these proceedings, as required by *Nollan*.

II

THE REFUSAL OF THE COURT BELOW TO COMPLY WITH THIS COURT'S NOLLAN MANDATE HAS DEPRIVED PETITIONER OF FEDERAL CONSTITUTIONAL SAFEGUARDS GUARANTEED TO ALL AMERICANS

The court below expressly recognized that petitioner raised a regulatory takings challenge under the United States Constitution. Disregarding the plain teaching of this Court,

however, the California panel declined to apply any meaningful scrutiny to the City's purported authority to confiscate a view easement across petitioner's land.

The City's case rests on its asserted authority to seize the equivalent of nine of petitioner's homesites in exchange for granting petitioner the "privilege" of developing the remaining five sites. Under *Nollan*, the court below was required to apply heightened scrutiny to this proposed regulatory seizure of property. Under any standard of review greater than fawning deference to state power, the City's actions would have been struck down as an "out and out plan of extortion." *Nollan*, 483 U.S. at 837.

Instead, the California court effectively asserts that *Nollan* does not exist. The appellate panel correctly observes that *Nollan* was not a physical takings case. *See*, Petitioner's Appendix at 3a-4a. But it also asserts that *Nollan* was not a regulatory takings case. *Id.* at 4a. Having thus "distinguished" this Court's landmark decision out of existence, the court below simply ignores the plain language of *Nollan* and looks the other way while the City confiscates petitioner's land.

In its haste to acquiesce in the City's uncompensated taking of property, the court below cites to its own erroneous holding in *Blue Jeans Equities West v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992). Petitioner's

Appendix at 4a. *Blue Jeans Equities*, a hopelessly garbled and self-contradictory opinion, proclaims that *Nollan's* heightened scrutiny requirement applies only to "possessory takings." The irony here is that the First Appellate District coined the *Blue Jeans* doctrine to avoid applying heightened scrutiny to the City's extortion of ***money*** from property owners. The forced exaction of ***land*** in exchange for the right to build--as in the case at bar--is precisely the sort of "possessory taking" that should trigger heightened scrutiny according to the *Blue Jeans* court itself.

The most glaring and outrageous misinterpretation of law in the opinion below is its citation to *Yee v. City of Escondido* for the proposition that *Nollan* involved a physical taking. Petitioner's Appendix at 4a. The entire thrust of this Court's holding in *Yee* was to ***distinguish*** *Nollan* from the physical taking theory unsuccessfully advanced by the plaintiffs in that case.

As the court below observes barely one paragraph later, *Yee* emphasized that a physical taking requires the forced submission of the property owner. *Yee*, 118 L. Ed. 2d at 165, *cited in* Petitioner's Appendix at 4a. This was obviously not the case in *Nollan*--the property owners would have been left in peace unless they insisted on exercising their constitutional right to build on their own property. Exactly the same situation pertains to the City's proposed

seizure of nine homesites if GGHI exercised its right to build five homes. The City's proposed regulatory taking of nine homesites *must* be subjected to heightened judicial scrutiny under *Nollan*. Instead, the court below applied no meaningful scrutiny whatever--beyond scrambling to create legal justifications for the City's confiscatory policies.

The rejection of *Nollan's* heightened scrutiny requirement by the court below is more than a simple mistake in the application of federal constitutional law. Rather, it amounts to a denial of fundamental rights guaranteed by the United States Constitution. The appropriate standard of judicial review is not a mere procedural detail. In close cases, the level of scrutiny determines the outcome of litigation. *See* R. S. Radford, *Statistical Error and Legal Error*, 21 LOY. L.A. L. REV. 843, 870-79 (1988). In the context of regulatory takings, the level of scrutiny determines whether individual property rights will be protected against predatory and confiscatory regulations--or not.

While California courts may be justified in departing from federal precedent in order to extend *greater* constitutional protections to California citizens than the federal courts provide, such is manifestly not the case here. To the contrary, the California Court of Appeal has *deprived* petitioner of important rights recognized and protected by the decisions of this Court.

CONCLUSION

The California court engaged in a tortured series of legal errors and contradictions in its devotion to upholding the City's confiscation of petitioner's land. The court declares that *Nollan* was not a physical takings case but, in the next breath, asserts that *Nollan* does not apply to regulatory takings. The court cites to its own erroneous holding in *Blue Jeans Equities* but then refuses to follow it. The court claims that *Yee* characterized *Nollan* as a physical takings case, yet it cites language from *Yee* plainly distinguishing *Nollan* from physical takings.

The net effect is a doctrinally incoherent opinion that will only exacerbate the already intense confusion that exists in the field of regulatory takings. For this reason, Pacific Legal Foundation respectfully urges this Court to grant the

petition for writ of certiorari in *Golden Gate Heights Investments v. City and County of San Francisco.*

DATED: September, 1993.

Respectfully submitted,

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